

Message

From: CN=Jason Brush/OU=R9/O=USEPA/C=US [CN=Jason Brush/OU=R9/O=USEPA/C=US]
Sent: 4/4/2012 6:53:15 PM
To: Wayne Nastri [Ex. 6 PII, Wayne Nastri]
CC: CN=Nancy Woo/OU=R9/O=USEPA/C=US@EPA
BCC: CN=Michael Szerlog/OU=R10/O=USEPA/C=US
Subject: Re: CWA Jurisdictional Guidance
Attachments: there is field guidance; procedures in place for EPA review of JD disclaimers; 1989 MOA; [Ex. 6 PII, Wayne Nastri]
legislation; have declined; scathing concurring opinion; Water

Hello Wayne -- Great to hear you're working on Bristol Bay! Alexis asked that I drop you a line on your JD question.

The current test for JD remains complex, but yes there is field guidance currently in effect from 2008. There are also procedures in place for EPA review of JD disclaimers under SWANCC or Rapanos criteria, where we can register our disagreement and/or invoke EPA's existing "special case" jurisdictional authority. We have 15 days to review signex (Rapanos) calls and 21 days to review isolated (SWANCC) calls. Formalizing objections requires HQ elevation via the "special case" procedures articulated in the 1989 MOA with Corps.

But in short, you're correct that JD calls are still a case-by-case thing, and likely to remain so even if refined procedures are finalized. But it's not just nexus; DOJ, EPA and Corps did agree some time ago that we can use either the Scalia standard ("Relatively Permanent" or RPW) OR the Kennedy standard ("Significant Nexus to Traditionally Navigable Waters") to assert jurisdiction, in addition to the explicit statutory categories of interstate, tidally influenced, RHA Sect. 10 waters, etc.

The guidance and rulemaking under current consideration by OMB, and on an OW shelf somewhere, respectively, would supersede the '08 procedures. In our opinion, the current drafts we've seen of either policy would make it easier to capture more of a watershed's aquatic resources for CWA protections than presently are reachable, but neither one would restore the extent of federal JD to pre-SWACC levels (let alone "expand" the govt's traditional regulatory reach).

Hope this helps!
All the best,

Jason A. Brush
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----- Forwarded by Jason Brush/R9/USEPA/US on 04/04/2012 10:58 AM -----

From: Alexis Strauss/R9/USEPA/US
To: "Jason Brush" <Brush.Jason@epamail.epa.gov>
Cc: Nancy Woo/R9/USEPA/US
Date: 04/02/2012 09:43 AM
Subject: Jurisdictional Guidance post-Sackett

Could you reply to Wayne and cc Nancy W? Thx

From: Wayne Nastri [Ex. 6 PII, Wayne Nastri]
Sent: 04/02/2012 09:30 AM MST
To: Alexis Strauss
Subject: Re: Jurisdictional Guidance post-Sackett

Thanks Alexis! Good luck in the acting position and in getting the permanent position. I'm familiar with Sackett vs EPA, and Mingo Mine vs EPA, and most recently EPA and Range Resources dropping their cases (smart move for the Agency). But what I am wondering is, what is the current test for JD? Is it still case by case, utilizing nexus ala Rapanos? and if so (and this is what I think it is), is there current guidance that specifies that? The Alaska AG may be asserting that the waters near the Pebble Mine are not jurisdictional and therefore not subject to EPA action (ala 404 permits). I find it hard to believe as there is significant nexus to the main rivers (which are navigable and have commerce) which in turn lead directly to the sea. Any help would be greatly appreciated but no worries if you cannot as I know how extremely busy you are and will be! Have a great day and I look forward to seeing you soon. All my best,

Wayne Nastri

Ex. 6 PII, Wayne Nastri

On Apr 2, 2012, at 8:43 AM, Alexis Strauss wrote:

Daily News

EPA Struggles To Complete Guide On Water Act's Reach In Wake Of Ruling

Posted: March 29, 2012

EPA and other agencies are grappling with a series of complicated questions as they work to complete guidance for determining if wetlands and other marginal waters are jurisdictional, a document that is taking on increased significance in the wake of the high court's recent ruling allowing pre-enforcement judicial review of EPA's Clean Water Act (CWA) orders.

Already, administration officials are hedging on when they expect to issue the long-awaited document, which has been pending for review at the White House Office of Management and Budget (OMB) since Feb. 21.

Nancy Sutley, chair of the White House Council on Environmental Quality, told Inside EPA March 27 that the administration "cannot commit" to a 90-day White House review, the usual time afforded to review of major policies.

And Steven Stockton, director of civil works for the U.S. Army Corps of Engineers, told Inside EPA March 28 that "It takes as long as it takes. Some people are hopeful that it could be as soon as a month."

Speaking to a March 22 conference on the 40th anniversary of the water law in her personal capacity, Donna Downing, a lead attorney in EPA's Office of Wetlands, Oceans and Watersheds, said that there are some "complexities" arising in discussions between the federal agencies that could take additional time to iron out, though she said the interagency comments will provide "valuable insight."

"The [guidance] is viewed as something that needed input from all the federal agencies," she said.

She said one issue under discussion is how the guidance deals with connectivity between marginal waters and jurisdictional waters -- the touchstone of the pending jurisdiction policy -- especially in the West where most rivers and streams are intermittent, not continuously flowing.

In the draft guidance, which EPA and the Corps released last April, the agencies say that establishing a significant nexus for marginal and jurisdictional waters is challenging and direct field staff to make case-by-case determinations, but generally indicate that those waters should not be aggregated for determining whether they are jurisdictional.

"Because such waters may be widely scattered geographically, and physically remote from jurisdictional waters, field staff should generally conduct significant nexus analyses for such waters individually, unless there is a compelling scientific basis for treating a group of such waters as similarly situated waters in the same region."

Environmentalists have urged EPA and the Corps to allow for aggregation of such waters in jurisdictional determinations, arguing that the vast majority of waters in the west consist of smaller headwaters and plains streams that do not flow year round or may not share a "significant nexus" with downstream traditionally navigable waters.

For example, Western Resource Advocates provided comments to EPA, Corps and OMB officials during a March 2 meeting, arguing that EPA Region VIII estimates only 17 percent of waters within its five states flow year-round. "Yet the importance of these waters to communities and aquatic life is undeniable," the comments say. "They deserve protection pursuant to the CWA and such protection is fully consistent with the goals and purposes of the Act."

A source familiar with the March 2 meeting said it was scheduled to "counter the drumbeat" that EPA and the Corps may be hearing from states and other federal agencies that subjecting those waters to CWA jurisdiction would overburden western states and conflict with broad definitions in many of the states for what constitutes a "state" water.

The source says that the language in the draft guidance is an improvement over the status quo because it presents a scenario under which aggregation would be appropriate, but it also sets a high bar that would exclude most waters from consideration.

Clarify Legal Tests

The guidance is intended to clarify tests that regulators should use to determine when waters can be regulated in the wake of two

Supreme Court rulings that have created significant legal uncertainties. In *Solid Waste Agency of Northern Cook Country v. U.S. Army Corps of Engineers*, the high court's 2001 ruling, barred regulators from citing the presence of migratory birds as the sole basis for asserting jurisdiction of wholly intrastate waters.

And in *Rapanos et al. v. United States*, the high court in a 4-4-1 split offered two tests for determining jurisdiction. One, authored by Justice Antonin Scalia, says that only "relatively permanent" waters that hold a "continuous surface connection" to a traditionally navigable water of the United States can be considered jurisdictional. In the second opinion, Justice Anthony Kennedy wrote an opinion that waters sharing a "significant nexus" with jurisdictional waterbodies can be subject to CWA regulations as well.

The rulings have served to foster uncertainty that puts EPA staff in a difficult position, Downing told the March 22 conference.

But critics are fighting EPA issuance of the guidance. A group of 30 Senate Republicans March 28 introduced legislation aimed at blocking the document, charging that it amounts to an unlawful expansion of the agency's powers.

The bill is one of two introduced by GOP lawmakers. Sen. Rand Paul (R-KY) has introduced more far-reaching legislation that would roll back the law's reach over marginal waters though industry groups, along with most GOP senators, have declined to support this approach.

Despite the stepped up political opposition, EPA and other sources say issuance of the guidance is even more important in the wake of the high court's recent ruling in *Sackett v. EPA* allowing recipients of administrative orders to challenge them before EPA seeks penalties.

While the court's unanimous ruling did not directly address the reach of the water act, the court's decision will allow plaintiffs to target the underlying determination that a water is subject to federal jurisdiction prior to incurring penalties.

"The [high court's] decision . . . may be invoked to support pre-enforcement review of jurisdictional determinations by EPA or the [Army Corps of Engineers] that particular wetlands and waterbodies are subject to the CWA," the law firm Van Ness Feldman said in a note to clients.

Moreover, Justice Samuel Alito in a scathing concurring opinion in *Sackett* criticized the pending guidance, saying it will continue to afford the agency too much discretion in making jurisdictional determinations, and called on Congress or EPA to shore up the policy with formal statutory or regulatory changes. "Far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff," Alito said.

Need For Guide

While Alito all but encouraged plaintiffs to challenge determinations, agency and other sources say that the need to finalize the pending guidance, crafted jointly with the Corps, is more urgent given the outcome in *Sackett* because it will help field staff make determinations that can be defended against legal challenges.

"The guidance will provide more predictable and consistent procedures for identifying waters and wetlands protected under the Clean Water Act," an EPA spokeswoman says.

And the Corps' Stockton told Inside EPA that the guidance should be "helpful" after the *Sackett* decision, adding that "Jurisdiction is always one of those very controversial areas when you get into any federal rulemaking program."

But Sylvia Quast, chief litigator for the civil defense unit within the U.S. Attorney's Office for the Eastern District of California told the "Clean Water Act At 40" conference that in the wake of *Sackett*, EPA is more likely to pursue compliance orders only in instances where they can clearly show significant nexus, in case those determinations are challenged in court.

Meanwhile, a legal source says that while the agency is expected to finalize the guidance, *Sackett* means that "it's going to be incumbent on the agency to develop an administrative record that supports [jurisdictional determinations], which could slow down the process" in the field.

But the source says that EPA may have removed key language in the draft of the guidance sent to OMB for review that would have stressed the importance of maintaining documentation to support the jurisdictional determination -- crucially important now that courts can review those decisions. "In light of *Sackett*, it is an issue they should revisit," the source says.

EPA, OMB and Corps officials met with several government groups last week to discuss the guidance, a source tracking the issue says, but the *Sackett* ruling or its potential impacts was not discussed.

However, the source says, EPA officials asked questions aimed at how to rectify any "contradictory provisions" between state, local or federal authority that might be in the guidance related to analysis of waters in the same watershed. One challenge the agency appears to be grappling with is how to clarify the "limits" in the guidance to make it clear in what instances waters are not subject to the scope of the CWA. -- Bridget DiCosmo

Related News: Water

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